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**THE BINDINGNESS OF MAZHAB IN ISLAMIC BANKING
CONTRACTS IN MALAYSIA**

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UUM
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**MASTER IN ISLAMIC FINANCE AND BANKING
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CONTRACTS IN MALAYSIA**

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**Thesis Submitted to
Othman Yeop Abdullah Graduate School of Business,
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in Partial Fulfillment of the Requirement for the Master in Islamic Finance and
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ABSTRACT

An issue of differing views among scholars from various *mazhab* on any unresolved *fiqh* issue poses confusion in the public. It also happens in dealing with Islamic banking contracts. There is a need for the final word that determines the right view of *mazhab*, especially for the law institutions which aimed at providing solutions to problems. Researchers have conducted an analysis on legal materials regulating Islamic banking institutions in Malaysia to see how this problem is addressed. This study has two objectives, namely: to study the position of reference to *mazhab* under Malaysia legislations governing Islamic banking in Malaysia and to study the application of reference to *mazhab* in *Shariah* Resolution of *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM) pertaining to Islamic Banking contract. The researcher found general provision in legislation regulating Islamic banking institutions in Malaysia on the prevailing practices of *mazhab*. The power to interpret the Islamic law lies with the *Shariah* Advisory Council. The researcher also conducted an analysis on *Shariah* Resolutions, founded that *Shariah* Advisory Council in determining the necessity of a contract has followed the fundamental basis of the proposal *Usul al-Fiqh* by referring to the Holy Quran and *Sunnah*, *ijmak*, and then referring to the view of the scholar of the *mazhab*. The *Shariah* Advisory Council has opennes by examining all the views of the four *mazhab muktabar*. It is found that there is no tendency to prioritize any *mazhab* as opposed to other *mazhab* because there is no difference in the views between scholars of *mazhab* in banking contracts analyzed by the author. In conclusion, the law regulating Islamic banking is general and can be challenged by in court. However, the ultimate authority are given to the *Shariah* Advisory Council to control this problem from becoming more critical.

Keyword: *mazhab*, legislation, *Shariah* resolution

ABSTRAK

Isu perbezaan pandangan dalam kalangan ulama dari pelbagai mazhab mengenai sesuatu permasalahan feqah yang tiada kesepakatan menimbulkan kekeliruan terutama pada golongan masyarakat awam. Permasalahan yang sama berlaku dalam isu membabitkan urusan kontrak perbankan Islam. Wujud keperluan kepada kata akhir yang menjadi penentu kepada pandangan mazhab mana yang tepat terutama dari sudut pandang undang-undang yang bertujuan untuk memberi penyelesaian kepada sesuatu permasalahan, Penyelidik telah menjalankan kajian kualitatif secara analisis kandungan ke atas bahan-bahan perundangan yang mengawal selia institusi perbankan Islam di Malaysia bagi melihat bagaimana masalah ini ditangani. Kajian ini mengandungi dua objektif iaitu untuk mengkaji kedudukan rujukan kepada mazhab di bawah perundangan Malaysia yang mentadbir perbankan Islam di Malaysia dan mengkaji rujukan kepada mazhab dalam Resolusi Syariah Majlis Penasihat Syariah Bank Negara Malaysia mengenai kontrak Perbankan Islam. Penyelidik mendapati tiada pernyataan yang jelas dalam mana-mana perundangan yang mengawal selia institusi perbankan Islam di Malaysia mengenai amalan bermazhab yang perlu diikuti. Sebaliknya kuasa mentafsirkan undang-undang terletak kepada Majlis Penasihat *Shariah* Bank Negara Malaysia. Penyelidik telah melakukan analisa terhadap Resolusi *Shariah* yang dikeluarkan oleh Majlis Penasihat *Shariah*. Penyelidik mendapati bahawa Majlis Penasihat *Shariah* dalam menentukan keharusan sesuatu kontrak telah mengikuti kaedah asas usul fiqh iaitu dengan merujuk kepada Quran dan Sunnah, kemudian kepada ijmak, dan kemudian barulah merujuk kepada pandangan ulama mazhab. Hasil kajian juga mendapati Majlis Penasihat *Shariah* bersifat terbuka dengan meneliti kesemua pandangan empat mazhab muktabar. Didapati tiada kecenderungan mengutamakan sesuatu mazhab berbanding mazhab lain kerana tiada perbezaan pandangan antara ulama mazhab dalam kontrak-kontrak perbankan yang dianalisa penulis. Kesimpulannya, undang-undang yang mengawal selia perbankan Islam masih bersifat terlalu umum dan boleh dicabar oleh para oportunis di mahkamah. Walaubagaimanapun, kuasa akhir menentukan sesuatu keputusan adalah diberikan kepada Majlis Penasihat *Shariah* yang mengawal masalah ini dari menjadi lebih kritikal.

Kata Kunci: mazhab, undang-undang, resolusi *Shariah*

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LIST OF ABBREVIATION

BNM	Bank Negara Malaysia
CBMA	Central Bank of Malaysia Act 2009
DFIA	Development Financial Institution Act 2002
FSA	Financial Services Act 2013
IFSA	Islamic Financial Services Act 2013
SAC	<i>Shariah</i> Advisory Council



CHAPTER 1

INTRODUCTION

1.0 Background of Study

Islamic banking and financial institutions has growth rapidly in Malaysia since 1983. The emergence towards the establishment of their own financial sector was due to the need of Muslim to avoid prohibited element exist in conventional banking. The removal of prohibited elements in business transaction such as *riba*, *gharar*, and *maysir* will make the transaction permissible. In attempt to avoid those prohibited elements especially *riba*, Islamic banks applied variety of contracts instead of lending and borrowing process which usually associated with *riba*. (Monzer Kahf, 2005)

However, after been operated for about 35 years many issues still arise within the practices in Islamic Finance and Banking institutions. According to Nejatullah Siddiqi (2006), one of the main issues in Islamic finance and banking is the divergence of Islamic ruling among Muslim scholars pertaining to Islamic banking products and facilities. This will lead to a misconception among the public in determining which of the correct and valid *Fiqh* ruling of *mazhab* to be followed.

The Difference in Understanding the *Hukm*

Islam is the complete religion in conducting and ruling the human daily life. Islam is not only focussing on the ritual aspect, it also governs the daily human's conduct. This clearly stated in the Holy Quran as Allah S.W.T says:

لَا إِلَهَ إِلَّا اللَّهُ وَكَهْتُنَا دِلُّوْكَ تَعَالَى عَتِّ ۖ رَضِ تَنْتَلُوْكَ إِلَهُ دِ ۖ ۛ - 3:5

“This day I have perfected for you your religion and completed My favour upon you and have approved for you Islam as religion”. [Qur'an 5:3]

Therefore, the rule and law regarding the practices of Muslim in daily life have been delivered towards Muslim in the two main sources of Islamic law namely, the Holy Quran and Hadith of Prophet Muhammad SAW. It includes the rule and law regarding the financial contracts and transaction. However, some of the rule cannot be understood due to the characteristic of both Quran and Hadith, especially Quran which known as *jawami'il kalam* (artistic language). The rules and law also not been clearly and specifically delivered. It needs the knowledge in *Usul al-Fiqh* (Islamic Jurisprudence) to understand the exact meaning of the Quranic sanction as well as Hadith of the Prophet SAW. Particularly in deriving the ruling (*hukm*) from the sources of Islamic law. (Wahbah Az-Zuhaily, 2004)

The level of understanding of person is different from one to another, no exception in understanding the rulings stated in the Quran and Hadith. For example, the ruling in well-known Hadith of the Prophet SAW during the war of Bani Quraizah. The Prophet SAW said to them:

“Do not pray Asr’ except at Bani Quraizhah. Then, during their journey some of them realise about the time of asr in the middle of their ways. Some of them said, “we will not pray until we arrived there. While, some of the other parties give opinion, “we just pray here because the prophets S.A.W don’t tell us to pray there”. Then when this situation been mentioned in front of the prophet S.A.W, he did not say any parties are wrong and not blamed any of them.

The Prophet SAW was explained that both parties considered as being right because it comes from the *ijtihad* of both. *Ijtihad* is an effort made by the *mujtahid* in seeking knowledge of the *ahkam* (rules) of the *Shariah* through interpretation. After that, this kind of situation occurs continuously till today among Muslim in order to deduce the

hukm (law). The main reason was because people have different approach and different understanding not only towards the main sources of *hukm* in Islam but also in another circumstance such as accepting *fiqh* methodology. It is more problematic as Islam is spreading widely all over the world where most of Non-Arabic people following Islam. (Ahsan Khan Nyazee, 2000)

From *Ijtihad* to *Mazhab*

Due to the hardship of the *ijtihad* process to derive the *hukm*, Muslim tends to follow *ijtihad* of Islamic scholars who are expert in the *Fiqh and Usul al Fiqh* (Islamic Jurisprudence) such as Maliki, Hanafi, Syafie, Hanbali, Auzai'e, Dzohiri and many other scholars from the generation of *tabi' tabiin*, continue with later generation of scholars such as Al-Ghazali, An-Nawawi and others. It significant with the Quranic verse:



فَلْيَسْأَلُوا أَهْلَ الْأُمُورِ لَعَلَّكُمْ تَعْلَمُونَ - 34:61

“if you realise this not, ask of those who possess the message” [Qur'an 16:43]

From this practice of asking and following the *ijtihad*, the practice of *mazhab* was born. Those scholars *ijtihad* are been acknowledge and been hold by Muslim in their time and place.

Nowadays, we have different *mazhab* all over the world. There are many *mazhab* been practices but only four that remain dominant namely Hanafi, Hanbali, Syafie and Maliki, usually been referred as *Ahlu Sunnah wa al-Jamaah*. Islamic scholars in these days usually referred to the opinion of the scholars from those *mazhab*. In the Malay Island region or known as *Nusantara*, *mazhab* Syafie was the most dominant but the other *mazhab* still exist and can be practiced.

1.1 Problem Statement

The issue of *mazhab* have been arising worst than ever recently due to the non-existent of specific and clear provision on the practices of *mazhab* in some important constitution. The provision of Islamic religion as official in Article 3 (1) of Federal Constitution only raises the discussion conflict in interpreting the meaning of Islam as an official religion which ultimately explains that it is specific to ritual aspects of official ceremonies alone. The question arises, does the expression "Islamic Religion" refer to *Shariah* law? Another question is what is the *mazhab* to be used in explaining Islam? This matter arises because in Islam there is a difference in the viewpoint between the *mazhab* in religious matters. This situation will undoubtedly affect the judiciary, especially to judges and lawyers. The constitution used for Islamic Finance and Banking in Malaysia also specific and clear provision to avoid the problem.

The absence of the interpretation of the law is also undoubtedly providing space and chances for the inclusion of advocates of supremacy such as Daesh who are based on *Wahabi Salafism*. According to Hizam Hanafiah such insights not only explicitly rejected the four major *mazhab*, but also considered the followers of four major *mazhab* as being out of Islam. Different opinion such as the law that affirms the tomb of the Prophet and the Guardian of Allah is prohibited cause confusion and chaos among Muslim in Malaysia. The highest level of concern is arguing in a community that ends up with violence as what has happen in the Middle East. (Utusan Malaysia, 2017)

Same things happen in the regulation of Islamic Finance and Banking. Such conflict becomes worsen as the cases related to the Islamic Finance and Banking is under

Civil Court. If the cases discussed in a Civil Court related to Islamic finance, the question arises as to what *mazhab* should be followed by judges in deciding cases related to Islamic law? What if the court ruled that they did not adhere to any *mazhab* except by the Quran and al-Sunnah? Likewise, if the case is appealed to a higher court, what if the judges convene to adhere to different *mazhab*? Likewise, if somebody or some party claims that he does not adhere to any *mazhab*? For example in Islamic finance, The Islamic Financial Services Act 2013 only clarifies the use of the phrase "Islamic law" (Islamic Financial Services Act 2013, section 29) but is not elaborated further. This will indirectly lead to the issues raised above.



1.2 Research Question

1. To what extent the Malaysian legislations governing Islamic banking institutions have a provision on reference to *mazhab* in the implementation of Islamic banking.
2. To what extent the *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM) is bound by the opinion of *mazhab* in *Shariah* deliberation of Islamic banking.

1.3 Objective of Research

The objectives of this research:

1. To study the position of reference to *mazhab* under Malaysia legislations governing Islamic banking in Malaysia.
2. To study the application of reference to *mazhab* in *Shariah* Resolution of *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM) pertaining to Islamic Banking contract.

1.4 Importance of Research

The function of law is to solve the issue or case and made it certain by giving best decision. Consequently, it also means the judge who is the last person to refer and given judgment regarding any case. In Islam, there is legal maxim method known as:

“The judgment by the judge cut the difference opinion”

It means that when the judge already made decision regarding the case, all the *khilaf* (difference opinion) are being cut or stopped. The judgment given by the judge will be the final resolution and its consequences will be applied even though his judgment might not be right.

Thus, the existence of specific law regarding the practices of *mazhab* in Islamic finance and banking will be very helpful to solve the problem regarding these matters in the court. Even though, civil courts still have higher authority and not bound to follow the Act and resolution in *Shariah* Resolution of *Shariah* Advisory Council of Bank Negara, the judge may still refer to the opinion given by them. In the case of *Re Dato Bentara Luar*, Yang Arif Salleh Abbas (Federal judge during the time) have given his respect towards fatwa given by Mufti Johor, where he said:

Mufti Johor in his fatwa (opinion)... have decided the wakaf is permissible. Even though we are not binding to accept the fatwa because we have authority to explain the Islamic law in any matters, we also not supposed to reject the opinion in the fatwa because just because the law of state and the responsibility to explain the law is our right. In our opinion, fatwa given by the highest Islamic authority in this state, whose give his whole life study and research the Islamic law, we actually does not have any reason to reject his opinion. Moreover, when we ourselves are not been taught about that law system and his opinion is not different with the other famous opinion in the book of Islamic law.

There are two things we can conclude from this case. Firstly, even though the court and judge are not binding to follow the opinion from any Islamic authorities or any person regarding Islamic law, they still may refer to their opinion because that opinion given by the person who has more understanding and knowledge regarding Islamic law. Secondly, the judge will not give his judgment carelessly without looking into the *fatwa*, *Islamic* book, Act, and any resolution in matters related to Islamic law. Thus, this research is important to resolve the issue regarding the practices of *mazhab* in Islamic finance and banking in Malaysia. The enforcement of law will be the wall from the entry of other unacceptable Islamic movements such as Daesh, ISIS, *Wahhabi* and *Syiah*.



1.5 Conclusion

In this chapter, researcher has explained the reasons on the need of this research. The problem of unresolved *Fiqh* issue was arising from having different *mazhab*; exist all over the world. It also leads to the confusion among the Malaysian citizen who relied on the scholars in these matters. Besides, the issue of *mazhab* become worst recently due to the non-existent of the regulation in these matters. In short, in this section researcher has explained the background of research, problem statement, the objective of research, the importance of research, and the scope of research. In the next chapter, the researcher will explain the methodology used in this research.



CHAPTER 2

LITERATURE REVIEW

2.0 Introduction

Based on the background of research, problem statements, and objective of research, in this chapter researcher will made a review on past literature about *mazhab* and its relation with Islamic law. It includes *kitab turath* (Islamic books) and journal to understand about the practice of following *mazhab fiqh*, the bindingness of *mazhab* in Malaysia and the bindingness of *mazhab* in Islamic financial transaction in overall.

2.1 The practices of following *Mazhab Fiqh* (Islamic School of Thought)

Mazhab derived from the Arabic words, also known as school of thought. Ibnu Manzur defined *mazhab* as something which been approach or been hold. According to Syeikh Muhammad al-Habib ibn al-Khawjah said *mazhab* is every law been hold by his follower where there practices it accordingly. It is also known as Islamic school of thought (Hapiz Mahaiyadin, 2017). There are long chronologies of how *mazhab* actually born but the main reason of it is known as *ikhtilaf* (different understanding) in the *ijtihad* among sholars. For example, different understanding method of deducing the *hukm* from the main sources and different method of *ijtihad*.

Ijtihad derived from the Arabic words of “*Jahada, Yajhadu*”, which literally means endeavoring to earnestly and spend time in earnest to achieve something. Technically, *ijtihad* is the full use of power to achieve the exact ruling of *Shariah* from its sources until the stage of feeling not able to go any further (Al-Amidi,

2003). In conclusion, the person who achieved the level of *Mujtahid* is an Islamic scholar who has tried all his efforts mentally and intellectually to study Islamic law. The term *Ijtihad* is much related to the term of *khilaf* or *ikhtilaf* which usually happen among the *mujtahid* scholars in understanding the ruling of *hukm*. *Khilaf* is the root word of *ikhtilaf* which literally means the difference. *Fuqaha* used the term *khilaf* as a special notion of disagreement between *fuqaha* or between the *mazhab* only on the “*furu’* law” (branch law), and not on the “*usul ahkam*” (basis of legal issues). (Abdul Halim, 2001).

The emergence of *mazhab fiqh* is due to the *ikhtilaf* among scholars of *mujtahid* status in any problems. According to Al-Syafie (1998) in his book *al-Risalah*, he divided *ikhtilaf* into two categories which are forbidden and permissible. According to him, the scholars do not differ in opinion in each case but only on certain issues. Differences in opinion are forbidden in the problems which has been clearly defined (*qat'ie*) of its law in the Qur'an and Sunnah, things that are generally well known in Islam and the *ijma'*. Al-Syafie does not prevent the problems which are not yet clear of the law and enable the emergence of different interpretations or those derived from the *qiyas*, which lead people interpret tending to a different law requiring *ijtihad* due to the nature of the Qur'an which contains the various possibilities. For example, the problems of direction of the *qibla*, the testimony, and the question of the term “*quru*” (the period) in the question of the women who were divorced (*talaq*), whereas Syafie define it as three times sacred from menstruation while Hanafi define it as three times of menstruation. In short, the second categories which is about the problems without any clear ruling of *hukm* is the only things been discussed among *fuqaha* and the difference opinion arises among them.

Regardless of how it was born and what is the reason behind it, the practices of following *mazhab* have been accepted by Muslim all over the world and supported by scholars from time to time. Famous contemporary scholar (Yusuf al-Qardhawi, 2003), discussed the law adhering to a *mazhab*. Initially, he supported the openness of *mazhab* based on the situation at the beginning of its appearance. It was based on Imam *az-zarkasyi* elaboration in the book *al-bahru al-muhith* which stated two different opinions from the previous scholars. The first opinion was stated by *Ilkia al-Hirasi* that the public must adhere to a certain *mazhab*. While the second opinion was taken by *Ibn Burhan*, which opposed to *Ilkia al-Hirasi* by argued that the public is not obliged to hold on to a particular school. *Ibn Burhan's* opinion was supported Imam Nawawi in his book *Awaail al-Qadhaa* '. Yusuf Al-Qardawi tends to follow the second opinion based on the practice of the companions who have not prevented the public's attitudes to tackle some of them without any particular engagement. This coincides with the actions of Imam Malik during the reigns of Caliph Ma'mun and Imam Ahmad Bin Hanbal which allowed people to choose which opinion to follow.

However, Yusuf al-Qardhawi tends to agree with Ibn al-Munir's views after the advent of the four *mazhab*, which is more moderate. According to Ibn al-Munir, after the development of *mazhab*, Muslim can identify which *mazhab* is easier and which is harder in any problem. So the person who requested the fatwa did not move from one *mazhab* to another *mazhab* except to simplify the problem. Al-Qardhawi stated this opinion is stronger because of the fact that the conscience is for a knowledgeable person who chooses a *mazhab* from another *mazhab* based on the scientific grounds he knows. As for the public who have no knowledge, they cannot choose the *mazhab* to follow. According to him, scholars also have dispute on the practice of changing from one *mazhab* to another. However, if the right opinion states that adhering to a

particular *mazhab* of the existing *mazhab* is not obligatory, indirectly changing from one *mazhab* to another is also allowed with the condition, it not due to following the desires or worldly interests. So, it is allowable to change only with the impetus of knowledge such as knowing the stronger arguments. Even so, it is only allowed to those who possess knowledge. For the public, it is not permissible to change the *mazhab* because basically the public does not have the *mazhab* and need to follow the opinion from his mufti or ruler.

The perception of *taqlid* are diverse due to the difference meaning given towards the term of *taqlid* itself. According to (Al-Hafnawi, 1995), the exact meaning of the term of *taqlid* is someone who is *muqallidin* (follower), follow (*ittiba'*) the opinion of *imam mazhab* or its scholars because of their believe towards their *ijtihad* from the Quran and Sunnah based on the right methodology which they believe its truth, whereas the *muqallidin* failed to understand the ruling by himself.

Abdul Karim Zaidan (2017) also discussed the law relating *taqlid mazhab* in his book. To deduce the hukm that has no *qat'ie* argument, the method of *ijtihad* must be used for those whose knowledge reaches the status of the *mujtahid*. While, for those who do not achieve the status of *mujtahid*, as most of the people, they have to use the *taqlid* approach which generally means someone's necklace to others. In specific, *taqlid* means to hold on to others' opinions without knowing their arguments and their strengths. The scholars differed in their view of *taqlid* which originally blasphemed in the Shari'ah because it is like following without argument (*dalil*). Some scholars do not allow *taqlid* while others think it is possible, but the the *rajih* is only on the prohibitions of the *taqlid* for those capable of *ijtihad*.

While Abdul Karim Zaidan opinions himself, the duty to follow Allah's command to each *mukallaf* demanded him to have knowledge related to the *hukm*. So, every *mukallaf* needs to make effort to have the ability to get into the right stage of *ijtihad*. If he has tried but still cannot afford it, he is allowed to ask the scholars about the *hukm*. He is also allowed to ask more than one scholar and no need to be tied to him. However, the *mukallaf* needs to choose the most widespread scholars of knowledge, the most fair, noble, and the most pious and acknowledged by the public. The emergence of *mazhab* in Islam is the result of the efforts of scholars who reach the level of *mujtahid* with the abilities, the piety and their abilities in dealing with a problem are also been acknowledged by another scholars.

He added that the practice of *taqlid* (following) to these *mazhab* is in line with the law of *taqlid* for those who cannot afford to *ijtihad*, that is, they are required to ask the scholars. Therefore, it is permissible for the public to follow a certain *mazhab* from the many well-known *mazhab* that are still preserved to date. But, if it is clear that the view of that *mazhab* is wrong and the truth is on the other side of the *mazhab*, it is obligatory for the followers of the *mazhab* to follow another *mazhab* in that matter alone. This means it is permissible for certain *mazhab* followers to follow other *mazhab* in some of the problems as there is no necessity for him to be bound by the entire *ijtihad* of his *mazhab*. But there must be strong and valid arguments. When he chooses to follow other *mazhab* in a particular problem, he must practice what he has learned and not change into another *mazhab* to make it easier.

There are also some other practices of *mazhab* in the discussion of Usul al-Fiqh such as the practices of *Talfiq*, *Takhayyur*, *Tatabbu 'al rukhas*, and *Tarjih*. *Talfiq* is defined by Wahbah al-Zuhaily (1993), as gathering *taqlid* of two or more scholars on an act which consist *rukun* or *juziyyat* related to each other. Every act has a special

law which is the subject of dispute among the scholars. When a person do *taqlid* to one *mazhab* in one problems and then taqlid to another *mazhab* in another problems, it is considered to be between two or more *mazhab*. Meanwhile, *Takhayyur* is the process of choosing one opinion from various opinions from different *mazhab* (Feisal Abdul Rauf, 2002).

Tatabbu 'Al-Rukhas is also defined by (Wahbah al-Al-Zuhaily, 2004) as the practice of choosing the easiest opinion among the opinions of the *mazhab* in any problem. While, *tarjih* is the process of choosing an opinion based on the strength of his argument and is considered as one of the forms of *ijtihad*. *Tarjih* was part of *Ijtihad intiqa'i* which means *ijtihad* to choose one of the strongest opinion among scholars opinions exist in the are of *fiqh* given by those *imam mujtahid* scholars. (Yusuf al-qardawi (1987). Asmadi Mohammad Naim (2007), stated that Middle-Eastern scholars tend to use *fiqh muqaran* (comparison) in their methodology of *Hukm* deduction for Islamic finance which close to the practice of *tarjih* to get the valid or nearest valid principle no matter which *mazhab* they belong to even though they agreed that *al-talfiq* and *tatabbu' al-rukhas* are permissible among ordinary people. Generally, it was the main reasons why some of the Islamic finance contracts in Malaysia in Malaysia are not been used in Middle-Eastern countries.

In conclusion, the practice of pursuing a *mazhab* at one time for Muslim such as practicing only *mazhab* Syafie is mandatory. However, the openness to follow the opinion of other *mazhab* is permissible with strong arguments only in such problems without the need to change the *mazhab*. In fact, it should be done if the opinion of the *mazhab* Syafie is wrong in any of the problems, but it is still not necessary to change *mazhab*.

2.2 *Mazhab fiqh* in Malaysia

An interesting study from Raihanah Hj Azahari (2007) found that the practice of law in Malaysia from the Sultanate of Melaka to the present day is only to stick to the Syafie sect alone. It is evidenced by the Malacca Code of Law which has been used as an example in the formulation of the laws of the Malay states in the past, where there is a section pertaining to the Muslim Marriage Act which is entirely the translation and modification of *fiqh* Shafie. Also there are copies of the original Syafie principles in matters of marriage and business. The Malacca Code of Law influences the Malay states such as Pahang and Johor; among the earliest state governments of Malaya in the formulation of their laws. It continues after independence when there is a tendency to refer to previous legal sources which are largely inclined to the Syafie sect because this practice is understood and applied in the administrative system and courts in the Malay States before independence.

The tendency to follow *mazhab* Syafie continues in legislation after independence although it is not explicitly stated. According to (Zakhiri et.al, 2017), Syafie's school has become a priority in the administration of Islamic Religion in Malaysia compared to the views of the other *mazhab* of four *mazhab muktabar*. Even though there is no clear statement on the practices of the Federal Constitution, the influence of the Syafie sect can be seen through the Laws of the States of Malaysia and the reference in issuing a fatwa by the State Fatwa Committee. However, the authors demanded it is still at general level and not uniform so that it can cause a conflict.

The study conducted by Idris Awang and Tengku Sarina Aini Tengku Kasim (2007), found that Syafie sect has become a culture in Muslim society in Malaysia. The Syafie sect culture is defined by authors as the transformation of the Malay Muslim's

community based on Syafie sect, where it is formed into the culture of society through education, environment, law, economy and belief. In the field of education, the Syafie sect has left a major influence in formal or informal education systems such as in cottages and *surau* which mostly use scholarly materials of Syafie scholar's such as al-Ghazali, al-Nawawi and al-Rafi 'i. Syafie sect also influenced the formal education system after Islamic education subjects were introduced under the Ministry of Education Malaysia. From the point of legal practice, the Shafi'i sect is so dominant and evidenced by the opinions of local scholars such as the mufti and the Fatwa Committee issuing on the basis of *fiqh* Shafi'i. Although there are some fatwa founded in other schools such as the Hanafi sect in the issue of zakat fitrah allowed with cash, which made after taking into account the benefits of society, it does not affect the position of Shafi'i sect in the practice of society from the perspective of Islamic law.

The study of Nornajwa Ghazali (2017) supports the existence of elements of tendency towards Syafie sect in the education system in Malaysia. It can be seen through the subject of Islamic Education which has been incorporated into the National Education System when the Education Act 1961 been enacted. It subsequently was made compulsory for Muslim students in the year 1964. After that, Ministry of Education Malaysia through the Islamic Religious Leadership Circular bills.1/1983, has issued instructions to all headmasters, principals in government aid schools and Islamic Education teachers to deliver the syllabus of Islamic Education in accordance with the view of Syafie sect. Indirectly, the Muslim community in Malaysia has been educated to understand and practice worship according to the Shafi'i sect as early as schooling which produce a generation that holds the Shafi'i *Mazhab*.

While in the State level, there are several studies conducted to study the tendency of attachment to *mazhab* Syafie. Noor Naemah Abd. Rahman (1970) analyzed the process of fatwa production of fatwa collection of Kelantan Ulama from the 1920s to the 1990s which was published by the Islamic Religious Council and Kelantan Malay Customs. According to him, the spirit of attachment to the *mazhab* Syafie in Kelantan has existed in the process of jurisprudence since the 1920s. Even in the early history of fatwa practice in the state of Kelantan there was the power of attorney given by Sultan Muhammad IV to Hj. Wan Musa, a mufti from 1908 until 1916, whose contents refers to the practice of attachment to the Syafie sect. However, recently the openness to the views of other *mazhab* has existed within a very remote scope but is accompanied by strict reasons based on the method that the fatwa may change based on changes in places, times, situations, motives, and risks to the benefit of the public.

Interesting study in Perlis by Saadan Man (2007) explains the influence of the *Syafie* sect in the state of Perlis behind the development of the *Islah* movement or also known as *Sunnah* in the state. According to him, the *mazhab* *Syafie* was dominant in Perlis since the early days of Islam in Perlis even though the *Sunnah* movement brought into Perlis was increasingly accepted by the people. The education system, legislation and community practices in Perlis are still based on the Shafi'i sect without denying the existence of openness to practice according to the *Sunnah* in accordance with the provisions of the law in Perlis. This is due to the dominance of Shafi'i sect as the main sect before the appearance of the *Islah* movement around the 1920s. Islam comes to Perlis through merchants from the Arab Land, especially from Hadhramaut, Yemen holding *mazhab* Syafie strongly. Then, the descendants of the Perlis King who also came from Yemen through Syed's descendants known as

Jamalullail, the leader and administrator of the Islamic religion, as well as religious figures appointed after that also among those who adhered to *mazhab* Syafie. Thus, the influence of the Syafie sect remains strong today in community practices as most mosques in the village, near southern Thailand and near Kedah still adhere to Syafi'iyah practice despite being monitored by the state government through Perlis Islamic Affairs Department and the Mufti Department pioneered by the movement sunnah

2.3 *Mazhab Fiqh* in Islamic Finance and Banking in Malaysia

Many of the previous studies that have been undertaken about *mazhab* in Islamic finance are quite general. The effect of the notion of the provisions of the law in clarifying this matter was raised by Noor Inayah Yaakub and Fatimah Yusro Hashim (2014) referring to their discussion of the deficiencies in the Islamic Banking Act 1983. According to them, section 2 of the Islamic Banking Act 1983 defining the Islamic banking business as "The bank business whose purpose and its handling does not involve any element unauthorized by Islam" has caused confusion. According to them, the phrase "Islamic Religion" can cause problems to the court against which views belong or are referred to in the phrase "Islam." These subscriptions may book an inaccurate understanding of the Islamic banking business by all parties involved such as judges, lawyers, financial institutions and customers of the bank itself. Also raised by Arieff Salleh Rosman (2012), the bigotry of *mazhab* without understanding the meaning of the suggestion for the conquest can lead to conflicts and misunderstandings in understanding the teachings of Islam.

An interesting study by Mohammad Azam Hussain *et. al* (2013), runs the review from the legal perspective on the *Shariah* Advisory Council (SAC) of Bank Negara

Malaysia (BNM). According to them, the *Shariah* Advisory Council comprising authoritative academics has been given the authority to issue any on the law of Islamic finance and Banking transactions in Malaysia. Islamic banks are also bound to follow the resolutions given by the *Shariah* Advisory Council on the matters concerned.

2.4 Conclusion

Based on the past literature review, the practices of *mazhab* has been widely accepted and been practiced all over the world as it was supported by the scholars. In Malaysia, they are tendency to follow *mazhab Syafie* even though there is no specific regulation towards the practices; as it was suggested to Muslim to choose only one *mazhab* to practices. However, the literature in the area of Islamic finance are still too general and they are no specific research was made towards the tendency or the practices of *mazhab* in Islamic Finance and Banking. Most of the study was made in other Muamalat transaction such as *waqf*, *zakat* and *faraid*. In brief, this research was the first to specifically investigate the practice of *mazhab* in Islamic Finance and Banking in Malaysia based the law applicable to it.

CHAPTER 3

RESEARCH METHODOLOGY

3.0 Introduction

A good research needs to employ a good research method to ensure that the objectives of the study will be achieved. In this chapter, the selection of methods, techniques and procedures in the research will be discussed. Among them are the research designs, the scope of the research, limitations, and types of data, the data collection methods and the method of analysis data.

A careful researcher must ensure the method used in obtaining data, in accordance with the type of research carried out. According to Ruhizan Mohammad Yasin et.al (2010), good data is derived from carefully designed research based on the appropriate design, which is the approach used in the process of obtaining research data.

3.1 Research Design

Research design refers to the planning process and is a systematic yet logical plan prepared for conducting a research study. As this study involves social issues of society, pure legal studies are not enough to get the results of the study. Therefore, this study uses legal method of legal-shaped law. So this study will use legal studies and qualitative approaches.

Denzin and Lincoln (1994) argue that qualitative research involves diversified methods in focus, including using naturalistic approaches to researching a subject. Cresswell (1994) defines that qualitative research as an inquiry process towards understanding based on common data collection methods used when reviewing social issues.

The researcher intends to use the legal research method of legal research to answer the first objective. While for the second objective, researchers intend to use legal research methods. This research is built in a descriptive study and content analysis.

3.2 Types of Data

Researcher will obtain the data from primary and secondary sources. Primary sources are the legal records of law, Act, legal provisions, Islamic law, and court case or authorized bodies to resolve conflicts. On the other hand, secondary sources in this study include resources explaining primary sources - books, journals, case summaries, local and international documents, local and international reports and library resources. Secondary sources are intended as an addition to primary sources.

3.3 Method of Data Collection

Data used in this study can be classified into two categories, primary data and secondary data. The collection method for primary data and secondary data is through library research. Data prioritization is dependent on access to services, costs, time, research expertise, level of accuracy and other attributes associated with data collection.

3.4 Primary Data and Secondary Data

Primary data and secondary data will be collected through libraries or legal approaches conducted by examining and analyzing the information contained therein. For the purpose of this study, all forms of law in Malaysia regarding Islamic schools and finance will be carefully examined and analyzed. Other data related to sectarian attachments in Malaysia will be taken from libraries such as the Library of Universiti Utara Malaysia and Library of Islamic Science University of Malaysia.

Data will also be obtained from online databases such as Lexis Nexis, Current Law Journal, Malayan Law Journal. This data includes books, articles, thesis and materials published. The use of documented data is aimed at achieving the validity and reliability of research findings on the broader objective of the study. In addition, researchers also conduct internet-based research and websites to obtain additional information. Among the websites visited by researchers are Bank Negara Malaysia (BNM) website, the Jabatan Kehakiman Syarie Malaysia (JKSM), and several other websites. From the print and electronic media information, this researcher mixes it, and then it becomes the data to be included in this research.

3.5 Data Analysis

In this research, every data collected is analyzed using content analysis and descriptive methods to achieve the objectives of the study. According to Walker, the method of content analysis requires researchers to describe the problem and the elements that make up and the rules that apply to each subject and its problems. The advantage of content analysis is low cost and time-saving. While the weakness of content analysis is that it requires further research through observation, interviews or experiments.

Although the content analysis approach comes from social sciences and science behaviours but this approach has also been used in research on Islamic law. Data obtained from court cases and legislations were analyzed using content analysis. Chatterjee states that the content analysis method also allows researchers to criticize, review and make suggestions for cancelling, making amendments and replacing weak laws.

While, descriptive method is intended to explain the facts, situations or events seen or felt by researchers. This method also states systematically what has happened or is happening. Every explanation needs to be understood, decomposed and clarified in all intentions whether expressed or implied. Descriptive methods can also provide the basis for content analysis methods.

3.6 Scope of Research

This research focuses on the legislations governing Islamic banking institutions namely Central Bank of Malaysia Act 2009, Islamic Financial Services Act 2013, Financial Services Act 2013 and Development Financial Institutions Act 2002. The researcher also focuses on the *Shariah* Resolutions of *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM) which issued by Bank Negara Malaysia.

3.7 Limitation

For *Shariah* Resolutions, the researcher only investigates the contracts applied by Bank Islam Malaysia Berhad in their deposit and investment products for personal banking. There are six products offered by Bank Islam Malaysia Berhad which is *Al-Awfar*, *Qard* Saving Account-i, Basic Saving & Current Account-i, *Qard* Current Account-i, Term Deposit-i (*tawarruq*), and *Wafiyah* Investment Account. In those six products, four Islamic contracts have been applied. Therefore, researcher will investigate four contracts that have been applied by Bank Islam Malaysia in those products which is *mudarabah*, *tawarruq*, *qard*, *wakalah bil-istithmar*. These four contracts will be analyze deeper by researcher to fulfil the objectives of research.

3.8 Conclusion

In this chapter, the researcher have discussed about the methodology of research to be applied in this research. Indeed, a good study is a result of good methods. By using some of the methods specified, the researcher hopes this study can be in accordance with its own unique standards and qualities. In obtaining this information as well, the researchers adhere to the research ethics that researchers should observe. This is obvious when Fine and Sandstorm (1988) say that a researcher must provide a comprehensive explanation of the purpose of the research, especially when the researcher has no full authority over the subject. All these ethics are to ensure the quality of the research.



CHAPTER 4

FINDINGS AND DISCUSSION

4.0 Introduction

This research consists of two main objectives. The first objective is to study the position of reference to *mazhab* under Malaysia legislations governing Islamic banking in Malaysia. Secondly, to study the application of reference to *mazhab* in *Shariah* Resolution of *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM) pertaining to Islamic Banking contract. In this chapter, researcher analyzes and discusses the findings of the study in this chapter based on two main objectives above.

4.1 The Position of Reference to *Mazhab* Under Legislations Governing Islamic Banking in Malaysia

There are four legislations governing Islamic banking in Malaysia; Central Bank of Malaysia Act 2009, Islamic Financial Services Act 2013, Financial Services Act 2013, and Development Financial Institutions Act 2002. Researcher analyzes all four Acts to study position of reference to *Mazhab* in those 4 Acts.

4.1.1 The Position of *Mazhab* in Central Bank of Malaysia Act 2009

Central Bank of Malaysia Act 2009 is an Act to provide for the continued existence of the Central Bank of Malaysia and for the administration, objects, functions and powers of the Bank, for consequential or incidental matters. It was

published in the *Gazette* on 3 September 2009 after getting the Royal Assent on 19 August 2009. It divided into 15 parts. Part 4 stated about Islamic Financial Business and Part 11 stated about Other Power of Bank the Bank with related to the study.

Interpretation

Before discussing briefly about the Act, researcher has examined the interpretation of the term related to every Islamic banking transaction. It is important to know the interpretation of every transaction to understand the how Islamic transaction are been interpreted in Central Bank of Malaysia Act 2009.

Based on the compilation of the terms below, all three terms include the phrase “which are in accordance with *Shariah*”. However, no further explanation about what made the transaction is in accordance with *Shariah*. Based on the interpretation; not only the interpretation of *mazhab* are not included but there are no explanations about the practices of *mazhab* in accordance with *Shariah*. In brief, the interpretation given is general and open to debate. The table below show the compilation of interpretation of the term.

Table 1: Interpretation of Term in Central Bank of Malaysia Act 2009

Term	Interpretation
Financing	means the giving of any advance, loan, credit or other facility in whatever form or by whatever name called, including the giving of a guarantee or undertaking of any surety obligations for another person and where such financing is extended in accordance with the <i>Shariah</i> shall include, and may be in the form of, without limitation, any sale or purchase arrangement, joint venture arrangement, deferred payment sale, return sharing arrangement or any other financing arrangement made in accordance with the <i>Shariah</i> ;
Islamic financial business	means any financial business in ringgit or other currency which is subject to the laws enforced by the Bank and consistent with the <i>Shariah</i> ;
Return	includes any form of rental, profit, dividend or benefit, including any fee or gift, payable or to be given in relation to financing extended in accordance with the <i>Shariah</i> ;

Part 4 of Central Bank of Malaysia Act 2009

Part 4 of Central Bank of Malaysia Act 2009 consists of two Chapters, whereas Chapter 1 is about *Shariah* Advisory Council, while Chapter 2 is about Powers of The Bank. In Chapter 1, Section 55 stated:

(1) The Bank shall consult the Shariah Advisory Council on any matter—

(a) relating to Islamic financial business; and

(b) for the purpose of carrying out its functions or conducting its business or affairs under this Act or any other written law in accordance with the Shariah,

which requires the ascertainment of Islamic law by the Shariah Advisory Council.

(2) Any Islamic financial institution in respect of its Islamic financial business, may—

(a) refer for a ruling; or

(b) seek the advice,

of the Shariah Advisory Council on the operations of its business in order to ascertain that it does not involve any element which is inconsistent with the Shariah.

This Act stated that the Bank shall consult the *Shariah* Advisory Council on matter under the section 55(1)(a), 55(1)(b) and (55)(1)(c). Besides, the bank also need to refer to *Shariah* Advisory Council in order to ascertain their business does not involve any element which is inconsistent with the *Shariah* as stated in Section 55(2)(a) and Section 55(2)(b). It shows that *Shariah* Advisory has been given the power by Central Bank of Malaysia to ensure Islamic financial business is in accordance with the *Shariah*.

Besides, Section 59(1) added the power to *Shariah* Advisory Council to advice the bank on any *Shariah* matter relating to the Islamic financial business carried on by any Islamic financial institution. The punishment for any person who fail to comply Section 59(1) are been stated in Section 59 (3), with fine not exceeding three million ringgit. The punishment strengthened the power given to the *Shariah* Advisory Council.

Part 11 of Central Bank of Malaysia Act 2009

In Part 11 of Central Bank of Malaysia Act 2009, Section 73 and Section 74 stated another power of *Shariah* Advisory Council, whereas Section 73(1) stated:

The Bank may, in giving effect to its objects, carrying out its functions or conducting its business or affairs under this Act or any other written law, put in place such arrangements or such measures as may be approved by the Shariah Advisory Council to ensure that such functions, business or affairs are in accordance with the Shariah.

And Section 74 (a) stated:

The Bank may purchase, acquire or lease immovable property—

- (a) for the purposes of carrying out its functions or conducting its business or affairs in accordance with the Shariah pursuant to section 73;*

Both Act support the power to decide the business or affairs that is in accordance with the *Shariah* is belong to *Shariah* Advisory Council, just as stated in Section 55 and Section 59 before.

4.1.2 The Position of *Mazhab* in Islamic Financial Services Act 2013

Islamic Financial Services Act 2013 is an act to provide for the regulation and supervision of Islamic financial institutions, payment systems and other relevant entities and the oversight of the Islamic money market and Islamic foreign exchange market to promote financial stability and compliance with *Shariah* and for related consequential or incidental matters. It was published in the *Gazette* on 22 March 2013 after getting the Royal Assent on 18 March 2013. It divided into 18 parts and

part 4 was the main part stated about the *Shariah* requirement. Part 4 also been divided into Division 1-*Shariah* Compliance, Division 2-*Shariah* Governance and Division 3- Audit on *Shariah* Compliance.

Interpretation


Before discussing briefly about the Act in part 4, researcher has examined the interpretation of the term related to every Islamic banking transaction. It is important to know the interpretation of every transaction to understand the how Islamic transaction are been interpreted in Islamic Financial Services Act 2013. The table below show the compilation of interpretation of the term.



Table 2: Interpretation of Term in Islamic Financial Services Act 2013

Term	Interpretation
Islamic Securities	means securities which are in accordance with <i>Shariah</i>
Investment Account	<p>means an account under which money is paid and accepted for the purposes of investment, including for the provision of finance, in accordance with <i>Shariah</i> on terms that there is no express or implied obligation to repay the money in full and—</p> <p>(a) either only the profits, or both the profits or losses, thereon shall be shared between the person paying the money and the person accepting the money; or</p> <p>(b) with or without any return;</p>
Islamic derivative	means any agreement, including an option, a swap, futures or forward contract, made in accordance with <i>Shariah</i> , whose market price, value, delivery or payment obligations is derived from, referenced to or based on, but not limited to, Islamic securities, commodities, assets, rates (including profit rates or exchange rates) or indices;
Islamic factoring business	<p>(a) the business of acquiring debts or other financial obligations due to any person arising from any transaction which is in accordance with <i>Shariah</i>; and</p> <p>(b) such other business as prescribed under section 3;</p>
Islamic foreign exchange market	means a foreign exchange market where the transactions, instruments or operations are not contrary to <i>Shariah</i> ;
Islamic payment instrument	means any instrument, whether tangible or intangible, which does not involve any element which is contrary to <i>Shariah</i> , that enables a person to obtain money, goods or services or to make any payment;

Financing facility	<p>means—</p> <p>(a) the giving of any advance or other facility in whatever form or by whatever name called;</p> <p>(b) the giving of a guarantee; or</p> <p>(c) any other dealing or transaction as prescribed under section 4;</p> <p>made in accordance with <i>Shariah</i> which shall include, and may be in the form of, any sale or purchase arrangement, joint venture arrangement, deferred payment sale, return sharing arrangement or other financing arrangement;</p>
Islamic deposit	<p>means a sum of money accepted or paid in accordance with <i>Shariah</i>—</p> <p>(a) on terms under which it will be repaid in full, with or without any gains, return or any other consideration in money or money's worth, either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and person accepting it; or</p> <p>(b) under an arrangement, on terms whereby the proceeds under the arrangement to be paid to the person paying the sum of money shall not be less than such sum of money,</p> <p>but excludes money paid <i>bona fide</i>—</p> <p>(i) by way of an advance or a part payment under a contract for the sale, hire or other provision of property or services, and is repayable only in the event that the property or services are not in fact sold, hired or otherwise provided;</p> <p>(ii) by way of security for the performance of a contract or by way of security in respect of any loss which may result from the non-performance of a contract;</p> <p>(iii) without limiting paragraph (ii), by way of security for the delivery up or return of any property, whether in a particular state of repair or otherwise; and</p> <p>(iv) in such other circumstances, or to or by such other person, as set out in schedule 2;</p>
Islamic leasing business	<p>“Islamic leasing business” means—</p>

	<p>(a) the business of letting or sub-letting movable property on hire in accordance with <i>Shariah</i> for the purpose of the use of such property by the hirer or any other person in any business, trade, profession or occupation or in any commercial, industrial, agricultural or other economic enterprise whatsoever and, where the lessor is the owner of the property, regardless whether the letting is with or without an option to purchase the property, and for the purpose of this definition, “movable property” includes any plant, machinery, equipment or other chattel attached or to be attached to the earth or fastened or to be fastened, permanently or otherwise, to any thing attached to the earth; and</p> <p>(b) such other business as prescribed under section 3</p>
Payment system	means any system or arrangement for the transfer, clearing or settlement of funds or securities where the operational arrangements of the payment system or business conduct of the operator of such payment system are in accordance with <i>Shariah</i> ;
 Provision of finance	<p>means entering into, or making an arrangement for another person to enter into, the businesses or activities which are in accordance with <i>Shariah</i> including—</p> <p>(a) equity or partnership financing, including <i>musyarakah</i>, <i>musyarakah mutanaqisah</i> and <i>mudarabah</i>;</p> <p>(b) lease based financing, including <i>al-ijarah</i>, <i>al-ijarah muntahia bi al-tamlik</i> and <i>al-ijarah thumma al-bai`</i>;</p> <p>(c) sale based financing, including <i>istisna`</i>, <i>bai` bithaman ajil</i>, <i>bai` salam</i>, <i>murabahah</i> and <i>musawamah</i>;</p> <p>(d) currency exchange contracts;</p> <p>(e) fee based activity, including <i>wakalah</i>;</p> <p>(f) purchase of bills of exchange, certificates of Islamic deposit or other negotiable instruments; and</p> <p>(g) the acceptance or guarantee of any liability, obligation or duty of any person;</p>

Based on the compilation of the terms above, most of the interpretation of the term regarding the Islamic Banking transaction usually include the phrase “which are in accordance with *Shariah*”. However, no further explanation about what made the

transaction is in accordance with *Shariah*. Based on the interpretation; not only the interpretation of *mazhab* are not included but there are no explanations about the practices of *mazhab* in accordance with *Shariah*. In brief, the interpretation regarding Islamic transaction in the Act is common and can be questioned in the Courts.

Division 1 of Part 4 of Islamic Financial Services Act

The first division in part 4 is regarding *Shariah* Compliance, consist of three Section, whereas Section 27 is about the interpretation, Section 28 regarding the duty of institution to ensure compliance with *Shariah* and Section 29 is regarding the power of banks to specify the standards on *Shariah* matters. Section 27 only stated about the interpretation of institution in this part which refers to an authorized person or operator of a designated payment system.

While for Section 28, the following is stated:

(1) An institution shall at all times ensure that its aims and operations, business, affairs and activities are in compliance with Shariah.

(2) For the purposes of this Act, a compliance with any ruling of the Shariah Advisory Council in respect of any particular aim and operation, business, affair or activity shall be deemed to be a compliance with Shariah in respect of that aims and operations, business, affair or activity.

(3) Where an institution becomes aware that it is carrying on any of its business, affair or activity in a manner which is not in compliance with Shariah or the advice of its Shariah committee or the advice or ruling of the Shariah Advisory Council, the institution shall—

(a) Immediately notify the Bank and its Shariah committee of the fact;

(b) Immediately cease from carrying on such business, affair or activity and from taking on any other similar business, affair or activity; and

(c) *within thirty days of becoming aware of such non-compliance or such further period as may be specified by the Bank, submit to the Bank a plan on the rectification of the non-compliance.*

(4) *The Bank may carry out an assessment as it thinks necessary to determine whether the institution has rectified the non-compliance referred to in subsection (3).*

(5) *Any person who contravenes subsection (1) or (3) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding eight years or to a fine not exceeding twenty-five million ringgit or to both.*

The same general interpretation are been used in Section 28(1) with the phrase “are in compliance with *Shariah*”, which have no further explanation about what made it in compliance with *Shariah*. Also there is no tendency of *mazhab* included. However, in the Section 28(2) and 28(3), explained that a business that compliance with any ruling of *Shariah* Advisory Council shall be deemed as in line with *Shariah*. Thus, the power to elaborate the term “compliance with *Shariah*” is belong to *Shariah* Advisory Council. Besides, the bank is bounded to follow and take an action as stated in Section 28(3)(a), 28(3)(b), and 28(3)(c). The Act also enforce punishment towards those whose fail to follow it in the Section 28(5), whereas the punishment is an imprisonment for a term not exceeding eight years or a fine not exceeding twenty-five million ringgit or both. In brief, this enforcement shows how powerful *Shariah* Advisory Council ruling regarding these matters. On the other hand, it also means *Shariah* Advisory Council has the power to explain the practices and the bindingness of *mazhab* in Islamic Financial Institutions in Malaysia.

While for the last Act in Division 1 of Part 4 of Islamic Financial Services Services Act (2013), Section 29 stated about the power of bank to specify standards on *Shariah* matters. Apparently, this Act just strengthened the power of *Shariah* Advisory Council with the Section 29(1)(a) and 29(1)(b), whereas stated the bank

may, in accordance with the advice or ruling of the *Shariah* Advisory Council, specify standards for *Shariah* matter and give effect to the advice or rulings of the *Shariah* Advisory Council. However, the bank still has power specify standards relating to any of the matters which does not require the ascertainment of Islamic law. The matters are regarding the *Shariah* governance as stated in the Section 29(2)(a) and other related matters as stated in 29(2)(b). While, the rest of Act, only stated about the person who bounded to follow the standard specifies by the bank under Section 29(1) and 29(2) and the punishment for who's failed to comply with any standard specified under Section 29(1) and 29(2).

Division 2 of Part 4 of Islamic Financial Services Act 2013

The second Division of part 4 is regarding *Shariah* Governance; consist of seven Sections from Section 30 to Section 36 as follow:

Table 3: Section 30 to Section 36 of Islamic Financial Sevices Act 2013

Section 30	Establishment of <i>Shariah</i> committee
Section 31	Appointment of <i>Shariah</i> committee member
Section 32	Duties of <i>Shariah</i> committee and its members
Section 33	Cessation as member of <i>Shariah</i> committee
Section 34	Notice of cessation as member of <i>Shariah</i> committee
Section 35	Information to be provided to <i>Shariah</i> committee
Section 36	Qualified privilege and duty of confidentiality

Basically, the Section in this Division is about the establishment of *Shariah* Committee for licensed person in Islamic Financial Institutions in ensuring their business, affairs and activities comply with *Shariah*. There is no regulation regarding

the practice of *mazhab* included in this Division. As for the appointment of the member's *Shariah* Committee, the requirements are included in the Section 32, whereas stated:

“No person shall be appointed, reappointed or accept any appointment as a member of a Shariah committee unless such person meets the requirements as set out in any standards as may be specified by the Bank under subparagraph 29(2)(a)(ii) and has obtained the prior written approval of the Bank.”

In brief, there is not mentioned specifically in the Act in this Division about the *Shariah* Committee members, will be chosen based on which *mazhab* they followed. It will give openness towards any *mazhab* follower to be *Shariah* Committee members based on the general provision in regulation. However, the power still belongs to *Shariah* Advisory Council.

Division 3 of Part 4 of Islamic Financial Services Act

The third Division of part 4 is regarding *Shariah* Audit Governance; only consist of 2 Sections, Section 37 and Section 38. Section 37 is regarding the appointment of person by institution to conduct audit on *Shariah* compliance and Section 38 is regarding the appointment of person by Bank to conduct audit on *Shariah* compliance. Basically, both Sections mentioned the same things about the requirement for institution and bank to appoint any person to conduct an audit on *Shariah* Compliance. It's good for double check the whole transaction and very important in ensuring the business and activities are *Shariah* Compliance. There is no discussion related to the practices of *mazhab* in this division.

Besides, there are another Section and Schedule in the Islamic Financial Services Act 2013 which also include the term “*in accordance with Shariah*” with no further explanation about it such follow:

Table 4: Section and Schedule in Islamic Financial Services Act 2013

Section 6	Regulatory objectives
Section 18	Grounds for revocation of authorization
Section 148	Islamic deposit
Section 152	Power of Bank to specify standards or issue codes
Section 153	Prohibited conduct in Islamic money market and Islamic foreign exchange market
Section 168	Power to issue directions to institution
Section 222	Interpretation
Section 224	Interpretation
Schedule 4	Business which is not Takaful business
Schedule 5	Factors for consideration in assessing application for licence under Section 10 or approval under Section 11

4.1.3 The Position of *Mazhab* in Financial Services Act 2013

Financial Services Act 2013 is an Act to provide for the regulation and supervision of financial institutions, payment systems and other relevant entities and the oversight of the money market and foreign exchange market to promote financial stability and for related, consequential or incidental matters. It was published in the *Gazette* on 22 March 2013 after getting Royal Assent on 18 March 2013. It divided into 17 parts and in part 3, Division 2- Restriction on dealings of authorized persons, under Section 15 stated about Authorized person and operator of designated payment system permitted to carry on certain Islamic financial business.

Section 15(2) stated:

(2) A person approved under subsection (1) shall be subject to—

(a) the provisions of the Islamic Financial Services Act 2013, in particular the provisions of Parts IV, VI, IX, X and XIII of the Act, in so far as those provisions relate to the business such person is approved to carry on under that subsection; and....

It strengthens the provision of the Act in those Parts in Islamic Financial Services Act 2013. As the researchers analyze Islamic Financial Services Act 2013 before, there is no clear provision regarding the position of *mazhab*. Only use the phrase “in accordance with *Shariah*” and further explanations about it belong to *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM). The same things also been stated in the Section 16(6)(b) in different phrase which is “not contrary to *Shariah*” which actually have the same meaning.

4.1.4 The Position of *Mazhab* in Development Financial Institutions Act 2002

Development Financial Institutions Act 2002 is an Act to make provisions for the regulation and supervision of development financial institutions and for matters connected therewith. It was published in *Gazette* on 7 February 2002 after getting the Royal Assent on 29 January 2002. It divided into 9 parts and Part 3A was the main part stated about Islamic Financial Business. Part 3A also been divided into Division 1- Interpretation, Division 2 - *Shariah* Compliance, Division 3 – *Shariah* Governance, and Division 4 - Audit on *Shariah* Compliance.

In Section 3, there is an interpretation of “financing facility” as:

- (a) an advance, loan or other facility, in whatever form or by whatever name called, by which the customer has access, directly or indirectly, to the funds of the prescribed institution and includes a financing facility which is made in accordance with Shariah; and*
- (b) the giving of a guarantee, credit insurance or takaful cover in relation to a financing facility;*

The phrase “in accordance with *Shariah*” is being stated in this Act too. There is no further explanation about it throughout the Act.

There is the same type of interpretation stated in Section 33A, whereas the term “investment account” and “Islamic deposit” stated as just has the same meaning as in the Islamic Financial Services Act 2013. The used of phrase “in accordance with *Shariah*” also can be found in Section 33B. While, the duty and power to ensure the business is in accordance with *Shariah* also stated in Section 33D, 33E, and 33F as belong to *Shariah* Advisory Council. While, Section 33N stated about the audit the *Shariah* compliance. Finally, Section 54 used the phrase “in accordance with

Shariah” once again, without further explanation of what made the transaction is in accordance with *Shariah*.

4.1.5 Consequences of Legislation

The final analysis found that, in the four of the Acts above does not provide any provision regarding the references to any *mazhab* recognized in Islamic law. It can be concluded that the law recognizes references to any *mazhab* recognized in Islamic law in conducting Islamic financial activities in Malaysia. What is important is not to contradict the principles of *Shariah* which does not involve the elements of *riba*, *gharar*, *maysir* and investment that conflict with *Shariah*. While, the power to explain about what made the transaction in accordance with *Shariah* is belong to *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM).

The consequences of general provision in legislation can be found in the Courts case. For example, in the case Public Bank v, Mohd Isa Mohd Nafidah, the issue of *bai' inah* arises in the case. *Bai' inah* is still subject to debate among four *mazhab* as the majority of scholars including *Hanafi*, *Hanbali*, and *Maliki* reject it. However, some minority including *Syafie* and *Dzohiri* permitted it with the condition that must be fulfilled. In this case, the court put the *Shariah* resolution of *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM) into his main consideration.

In the same case, the issue regarding *bai al-ma'dum* (selling non-existent subject matter) also arise. This issue also subject to the debate among scholars whereas *Hanafi* and *Syafie* not allowed the transaction to avoid elements of *gharar*. However, they excluded several types of sale of non-existent subject matter such as *salam*

(forward sale) and *istisna'* (manufacturing sale). *Ibn Taimiyyah* and *Ibn Qayyim* argued that *bai al-ma'dum* is permissible if the non-existent subject matter is under construction or on map. They argued that *Shariah* actually prohibit *bai' al-gharar* not *bai' al-ma'dum*. If the subject matter is capable to be delivered, it will remove the element of *gharar*. By the ways, selling subject matter which is under construction is the same as *bai istisna'* from the view of *Shafie* and *Hanafi*, not *bai al-ma'dum* and it also permissible by them. In the end, the court referred to the resolution of *Shariah* Advisory Council, as they response to the issue in their 123rd meeting. The resolution by *Shariah* Advisory Council allowed the transaction. They stated that it is in accordance with *Shariah* without mentioning any opinion from any *mazhab* or any scholars.

In the case of *Bank Islam Malaysia Berhad v. Lim Kok Hoe & Anor and Other Appeals*, also the problem arises due to the general provision of legislation. The main issue of the case is regarding the common judgment delivered by Kuala Lumpur High Court on 18 July 2008 for 12 cases concerning Islamic financing whereby the learned judge declared that the *Bai' Bithaman Ajil* contract was contrary to the religion of Islam. In the event, the learned judge questioned the validity and enforceability of the *Bai' Bithaman Ajil* contract on two main grounds, namely: (1) that the *Bai' Bithaman Ajil* contract was "far more onerous than the conventional loan with *riba*" which was prohibited and unequivocally condemned in Islam and (2) that the *Bai' Bithaman Ajil* contract practiced in this country was not acceptable by all four *mazhab* in Islam. The learned judge ruled that that *Bai' Bithaman Ajil* contract was only acceptable to one *mazhab*, and that was not sufficient to say that it was approved by the religion of Islam which was requirement under Section 2 of

Islamic Banking Act 1983. Bank Islam Malaysia Berhad, being adversely affected by the above rulings, filed 12 separate appeals to the Court of Appeal of Putrajaya.

The rulings given by the learned judge of Kuala Lumpur High Court shows the consequences of general provision regarding the religion of Islam as stated in Section 2 of Islamic Banking Act 1983. Basically, about the issue of *Bai' Bithaman Ajil* contract being “far more onerous than conventional loan with *riba*”, was arises due to lack of information or misunderstanding about the contract from the learned judge. However, regarding the question about the practices of *Bai' Bithaman Ajil* only been accepted by one *mazhab* only, the learned judge had misinterpreted the meaning of “do not involve any element which is not approved by the Religion of Islam”. First, under Section 2 of the Islamic Banking Act 1983, “Islamic banking business” does not mean banking business whose aims and operation are approved by all the four *mazhabs*. Secondly, Religion of Islam is not confined to the four *mazhab* alone as the sources of Islamic law are not limited to the opinion of the four imams and the *mazhab* named after them. In addition, the power to interpret the term are given to the *Shariah* Advisory Council which been established through an amendment of the Central Bank Act 1958. Section 16B of the Central Bank Act 1958 established the central *Shariah* Advisory Council under the aegis of Bank Negara Malaysia. With the amendment, the single *Shariah* Advisory Council became “the authority for the ascertainment of Islamic law for the purpose of Islamic banking business, takaful business, Islamic financing business, Islamic development financial business or any other business which based on *Shariah* principles”. Therefore, the court will have to assume that the *Shariah* Advisory Council would have discharge their statutory duty to ensure that the operation of the Islamic banks are within the ambit of the Religion of Islam. Thus, the learned judge, with respect,

should not have taken upon himself to rule the *Bai' Bithaman Ajil* contracts were contrary to the Religion of Islam without having any regard to the resolutions of the *Shariah* Advisory Council of Central Bank Malaysia.

The issue regarding the contract of Bai Bithaman Ajil also arises in the case of Arab-Malaysian Merchant Bank v. Silver Concept and Arab Malaysian Finance Bhd v. Taman Ihsan Jaya Sdn Bhd & Ors; Koperasi Seri Kota Bukit Cheraka Bhd (Third Party) and other cases whereby the fundamental issue was the general provision in legislation. For both cases, the issue of what *mazhab* to be followed arises and questioned due to the general provision of legislation where it needs the exact provision to be followed.

In brief, all the cases above shows the consequences of finding by researcher. There is no specific provision about the position of reference to *mazhab* and no further explanation about what made the transaction is in accordance with *Shariah*. Besides, the power to explain about what made the transaction is in accordance with *Shariah* is belong to the *Shariah* Advisory Council.

4.2 The Position of Reference to *Mazhab* in the Contracts Applicable by Islamic Banking Institution in Malaysia Based on the *Shariah* Resolution of *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM)

Shariah resolution of *Shariah* Advisory Council Bank Negara Malaysia is a resolution or decision regarding *Shariah* matters issued by the *Shariah* Advisory Council of Bank Negara; the highest body which has authority to ascertain Islamic law related to Islamic Finance in Malaysia. According to section 52(1)(a) of Central

Bank of Malaysia Act 2009, one of the function of *Shariah* Advisory Council of Bank Negara is to decide the “*hukm syarak*” (Islamic law *Shariah* ruling) regarding any related ruling to the Islamic banking and finance. The resolution given by the *Shariah* Advisory Council of Bank Negara is binding towards Islamic Finance Institutions based on the Section 57 Act 701 which provided that:

“57. Any resolution which decided by Shariah Advisory Council of Bank Negara based on the reference made under this section must be binding towards financial institutions under section 55 and Court or arbitrator whose refer under this section 56”.

Therefore, any resolutions made by *Shariah* Advisory Council have power to enforce anything related to *Shariah* matters within Islamic Financial Institutions in Malaysia. In simple words, the resolutions made by them will be deciding factors towards the permissibility to apply the contracts.

Researcher made an analysis towards four contracts in *Shariah* Resolution of *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM) to analyze the position of reference to *mazhab*. It includes the contracts of *Mudarabah*, *Tawarruq*, *Wakalah Bil-Istithmar* and *Qard*.

4.2.1 *Shariah* Resolution of *Mudarabah*

Mudarabah is a contract based on partnership where one parties provided capital known as *rabbul mal*, while the other one provided his talent to run the business.

Resolution and Basis of Judgment by *Shariah* Advisory Council

Resolution:

*“Shariah Adivosry Council at the 4th meeting on 14 February 1998 and the 59th meeting on 25 May 2006 has decided that current account based on the concept of *mudarabah* is in accordance with Syarak as long as it fulfil the condition of *mudarabah*”*

Basis of judgment:

This *Shariah* Advisory Council decision is in line with the mandatory *mudarabah* contract in the deposit instrument. Additionally, deposit withdrawals can be made at any time for a *mudarabah*-based current account. This is because the requirement of minimum balance limit in the current account make the condition of *mudarabah* capital is fulfilled. Accordingly, if a depositor withdraws the entire deposit amount, the *mudarabah* contract is terminated because the withdrawal of the entire deposit amount is seen as the action of the rabbul mal withdrawing the capital management mandate. This is seen in line with the agreement in all four *mazhab* that the *mudarabah* contract is cancelled or terminated through a clear cancellation statement, or through the action of the rabbi withdrawing the capital management mandate.

Analysis:

Based on the basis of judgment above, *Shariah* Advisory Council give permission based on the *mudarabah* concept where the practice must be in line with the mandatory of *mudarabah*. *Shariah* Advisory Council stated that the permission given is in line with the argument of four *mazhab*. Here, we could understand that *Shariah* Advisory Council are investigate the opinion from all four *mazhab muktabar* Hanafi, Maliki, Syafie, and Hanbali. As there is agreement among all four

mazhab, we cannot see the tendency towards any *mazhab*. In short, *Shariah* Advisory Council made the resolution based on the agreement from all four *mazhab*. It means that if there is no dispute among all four *mazhab*, there is no need for other opinion.

4.2.2 *Shariah* Resolution of *Tawarruq*

Tawarruq is one of the most commonly used contracts by Islamic bank nowadays.

Resolution and Basis of Judgment by *Shariah* Advisory Council

Resolution:

*“Shariah Advisory Council at the 51st meeting on 28 July 2005 has decided that deposit product based on the concept *tawarruq* is permissible”*

Basis of judgment:

The decision above was made based on the consideration of the *dalil-dalil* (argument) and opinion towards the permissibility of *tawarruq* such as:

- i. Allah SWT narrated:

أَحْمَلًا لِّبَعِّ هَرَوَ لِبَّآ ٣ - 2:2

“...But Allah has permitted trade and has forbidden interest...”

Based on general understanding of the verse, scholars believe that *tawarruq* is permissible because it is part of the buying and selling activities. It may occur with the purpose of earning cash either with or without the knowledge of all parties

involved. It is also possible been done because of the urgency of the situation or as a custom or habit in the practice of some parties or institutions.

ii. *Fiqh* method

"According to the original method of law, it is a must, unless there is a proposition that bans it."

iii. Scholars opinion: The view of current scholars has required the use of *tawarruq* based on views among the schools of Hanafi, Hanbali and Syafii which require the use of *tawarruq*.

Analysis:

Based on the basis of judgment above, there are three main considerations used by *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM) regarding the permissibility of *tawarruq* contracts application in Islamic bank in Malaysia. The first one is the *dalil* (argument) from Quran in *Surah Al-Baqarah* verse 275. This verse is generally about the permissibility of buying and selling for Muslim. From the general understanding of the verse, *tawarruq* may be permissible because it consist both of selling and buying activities but involves more than one parties. Secondly, *Shariah* Advisory Council put the *fiqh* method known (name of method) into their consideration. This method basically means any *muamalah* (transaction) is permissible unless there is prohibited element such as *riba*, *gharar*, and *maysir* involves in the transaction.

As the verse narrated in general and the *fiqh* method used are also too general, its required explanation or an opinion by scholars about what made the buying and

selling activities in *tawarruq* is permissible. Therefore, *Shariah* Advisory Council put the opinion by Muslim scholars into their consideration. They stated clearly that the view of current scholars has required the use of *tawarruq*. It is based on opinion among the schools of Hanafi, Hanbali and Syafie which require the use of *tawarruq*. However, they not mentions about the names of scholars or any further discussion about the opinion given. It shows that *Shariah* Advisory Council has at least made a review on the scholarly opinion among the four main Islamic schools of thought into their consideration but not includes further discussion. They may have their own reason why further discussion is not needed.

4.2.3 *Shariah* Resolutions of *Wakalah Bil-Istithmar*

Wakalah is an agency contract where someone appointed a person to act on his behalf in any transaction. In the context of Islamic finance, usually someone will appoint financial institution to complete the transaction on his behalf with the wages given in return.

Resolution and Basis of Judgment by *Shariah* Advisory Council

Resolution:

“The Shariah Advisory Council at the 2nd special meeting dated 18 June 2007 has decided that the deposit account based on the wakalah bi al-istithmar contract as proposed is allowed, subject to the following conditions:

i.If the Islamic financial institution violates the terms of the agreement or negligence by investing in an instrument that does not have the potential to generate profit at a minimum rate (eg 5% per annum), the Islamic financial institution will indemnify the principal amount of the investment plus the actual profit (if any) ; and

ii.If Islamic financial institutions invest in instruments that are expected to generate profits at least 5% per annum but fail to achieve the targets due to problems that are not caused by negligence of Islamic financial institutions, losses are fully borne by the customers.

Basis of judgment:

The *wakalah* bi al-istithmar principle is similar to the principle of *mudarabah* as agent act to accept deposit money from customers for investment purposes. The only difference is the underlying *wakalah* contract is *ujrah* or wages. The implementation of the principle of *wakalah* in this form does not conflict with *Shariah* requirements as long as the original features of *wakalah* are still preserved. This is in line with the *wakalah* requirement stated in the Qur'an:

فَلْيَبْعُوا أَمْثَلَهُمْ بَهَارَ الْمَدِينَةِ فَيَكُونُوا لَهُمْ عَاقِبَةً
سِبْطِ الْقِيَامَةِ ۚ - 81:81

"... now send one of you, bring this silver money to the city then let him choose the kind of good food, then let it bring you a little share of it ..."

The permissibility of *Wakalah* are stated by Rasullah SAW as narrated in the following hadith:

عَنْ عَبْدِ اللَّهِ بْنِ مَسْعُودٍ أَنَّ رَسُولَ اللَّهِ ﷺ أَعْطَاهُ
عِشْرَةَ أَوْسٍ أَوْسٍ صَحَابَةٍ قَبِيضٍ ۖ فَفَرَّقَهُنَّ بَيْنَ صَحَابَةٍ
فَقَالَ صَحَابٌ أُمَّتٌ

"From `Uqbah ibn `Amir narrates that the Messenger of Allah gave him some sheep to be distributed to his companions and a young goat after the distribution. He informed Rasulullah SAW about it, and he said: It is a charity for me. "

لُسْنُهُ عَهْدِي شُرُطِي إِلَيْهِمْ طَاهِرٌ حَلَّلَ أَحَمُّ هَٰذَا

"The affairs of the Muslims are based on the terms of which they agree, except the conditions to legalize what is illegal or to prohibit what is lawful."

Based on this *hadith*, customers have the right to set up Islamic financial institutions as authorized representatives to invest in instruments that are potentially generating at least minimum profits. Accordingly, if the customer decides to terminate the investment contract and withdraw the entire deposit amount, the customer is deemed to withdraw the capital management mandate from the Islamic financial institution. In this case, the customer is entitled only to the value of the current investment. This is seen in line with the agreement of the four *mazhab* in investment contracts such as *mudarabah*, that all *mazhab* agree that the *mudarabah* contract is cancelled or terminated through a clear cancellation statement, or through capital contributing action to withdraw the capital management mandate.

Analysis:

Based on the basis of judgment above, there are three main consideration of decision by *Shariah* Advisory Council towards the permissibility of *wakalah bil istithmar*. Firstly, the Quranic verse about the practice of *wakil*. Secondly, the *hadith* narrated by Prophet SAW towards Uqbah bin Amir. This two is comes from the main sources of Islamic law, Quran and *Hadith*. Before that, *Shariah* Advisory Council stated that *wakalah bil-istithmar* principle is similar to the *mudarabah* with the only difference is *ujrah*. Therefore, any ruling related to *mudarabah* may relate to *wakalah bil-istithmar* as well. In that sense, *Shariah* Advisory Council stated in the event of the withdrawal entire money by the customer, the customer is deemed to withdraw the capital management mandate from the Islamic financial institution and only entitled

to the value of current investment only. It is the same as *mudarabah* contracts, whereas all four *mazhab muktabar* agree that the *mudarabah* contract is cancelled or terminated through a clear cancellation statement, or through capital contributing action to withdraw the capital management mandate

4.2.4 Shariah Resolution of Qard

The issue arise on the contract of *qard* is not about the permissibility of the contract but about the usage of the term *qard* and *qard hasan*. The use of the concept of *qard hasan* on the right track and in accordance with Syarak would certainly benefit the contracting party. However, if this concept is been practice inappropriate ways, it may affect the image of the Islamic financial system. Among the issues that arise in Islamic finance in relation to the use of *qard hasan* are:

- i. Whether the real meaning of *qard hasan* is an irrevocable gift or otherwise. This refers to situations where Islamic financial institutions intend to bring cases of customers who fail to settle financing provided by Islamic financial institutions based on *qard hasan* to court; and
- ii. Given that Islamic financial institutions provide funding using deposits from customers who are looking for profit, *qard hasan*-based financing is not as well suited as the purpose of *qard hasan* is not for profit, but it is *tabarru`* or charitable.

In this case, *Shariah* Advisory Council is referred to the issue of whether a financing product using the *qard* principle is permissible because the use of this concept in the financing product is contrary to the true meaning of *qard* in accordance with Syarak. The *Shariah* Advisory Council also been referred to the issue of whether the word

"*hasan*" may be removed from the term "*qard hasan*" adopted in the Islamic financial system.

Resolution and Basis of Judgment by *Shariah* Advisory Council

Resolution:

The Shariah Advisory Council at the 51st meeting dated 28 July 2005 has decided that the financing products using the qard principle are permissible. However, the word "hasan" shall be dropped from the term "qard hasan" to illustrate that the qard given is repayable by the borrower to the lender or the financier and this responsibility will be borne by the borrower's heir if the borrower dies before he has paid all the amount of debt.

Basis of judgment:

The scholars define the *qard* as the granting of a property to the party utilizing it for the sake of making love and being replaced in return. The scholars agree that the *qard* is permissible based on the Quranic verses, Sunnah and *ijmak*. Among the Qur'anic verses that are the basis of the *qard* requirement are as follows:

يَا ذَا الَّذِي قَرْضُ اللَّهِ أَقْرَضًا حَسَنًا فَيُضَاعَفَ نَ هُنَّ عَدَّةُ النَّفْسِ ۚ لَلَّ
قَرْضُ نَبْسُ ظُ لَّ يَسْجَعُ ۚ - 2:2:3

"Who is the person who (want to) lend to Allah SWT as a good loan so that Allah SWT multiply his recompense in multiplicity? And Allah SWT restricts and enlarges and to Him you will all be returned. "

According to *tafsir* scholars, the term *qard hasan* in the context of this verse refers to the act of giving *infak* to the path of Allah SWT. The term *qard* literally means loan and not *infak*. However, the scholar's interpretation says that the *qard* term used in this verse is aimed at glorifying people as Allah SWT chooses to speak to humans using common and comprehensible vocabularies. The permissibility of *qard* in the

sense of borrowing is based on this verse based on the meaning of the verse because it is unlikely that Allah SWT will discuss and equate something organized as in fact with something prohibited. This indicates that the *qard* is permissible.

In relation to the recommendation that the Islamic financial institution not use the word "*hasan*" in the terms of the *qard hasan*, the *Shariah* Advisory Council backed its decision to the following argument:

- i. The *fiqh* scholar does not describe *qard hasan* in particular but only talks about *qard* concept and its necessity in terms of *Shari'ah*. Generally, *qard hasan* talks about giving *infak* to the path of Allah SWT; and
- ii. The word "*hasan*" if referred to the Qur'an means the infidel given sincerely and only expect the reward of Allah SWT.

Based on this fact, it is concluded that the use of the term *qard hasan* to refer to a loan in the context of *mua'malah* especially Islamic finance is inaccurate. This is because based on the definition of *qard* by scholars of *fiqh*, a loan (*qard*) should be paid off. Thus, the term *qard* is seen to be more coinciding with the non-interest-bearing loans practiced by the current Islamic financial industry.

Analysis:

Based on the basis of judgment above, *Shariah* Advisory Council stated that *qard* is agreed by all scholars based on the Quranic verses, *sunnah* ad *ijmak*. However, *Shariah* Advisory Council only include the Quranic verse into the basis of judgment, *sunnah* and *ijmak* have no further elaboration. The statement "agreed by all scholars" usually refers to the agreement among four *mazhab muktabar* including Syafie. The

other judgment about using the words of *qard hasan* are not related to the *mazhab fiqh*, but related to *tafsir* scholar.



CHAPTER 5

CONCLUSION AND SUGGESTION

5.0 Conclusion

In short, this research consists of two main objectives; to study the position of reference to *mazhab* under Malaysian legislations governing Islamic banking institutions namely, Central Bank of Malaysia Act 2009, Islamic Financial Services Act 2013, Financial Services Act 2013, and Development Financial Institutions Act 2002, and to study the application of reference to *mazhab* in *Shariah* Resolution of *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM) pertaining to Islamic banking contract.

Based on the analysis by researcher towards the legislations governing Islamic banking institutions, there is no specific provision of law which stipulates the matter pertaining to reference to *mazhab*. Only the term “in accordance with *Shariah*” are widely been used in ensuring the activities are in line with *Shariah*. The term is too general and still has the room for challenge by opportunist about what made the transaction is in accordance with *Shariah*. However, the power to explain about which activities are in accordance with *Shariah* is under jurisdiction of *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM). Therefore, the resolution made by *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM) is important to resolve the issue of what transaction allowed under the term “in accordance with *Shariah*”.

For *Shariah* Resolution of *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM), the researcher found that the tendency towards the practices of

mazhab. It means the *Shariah* resolution made by *Shariah* Advisory Council has described about which activities is in accordance with *Shariah*. Basically, it's more about which contracts is in line with *Shariah*. *Shariah* Advisory Council has practices the method of deducing the ruling (*hukm*) by looking into the main sources of Islamic law, Holy al-Quran and *Sunnah* into their main consideration in all four contracts. Then, it was supported by opinion among four *mazhab*. In these four contracts, the tendency towards one *mazhab* only, cannot be found because of the agreement among the scholars of four *mazhab*. In brief, *Shariah* Advisory Council also put the opinion from the four *mazhab* into their basis of judgment in these this four, which coincidently have no dispute among the scholars of four *mazhab*.

5.1 Suggestion

The issue of general provision in Malaysian legislations governing Islamic banking should be addressed by respective authority to avoid any legal conflict in the future. These general legal provisions may be seemed as not a big problem in this day, but we cannot predict in the future. Another things is about how *Shariah* Advisory Council are been chosen. As the full power given to the *Shariah* Advisory Council, there is a need of provision about the requirement to be appointed as *Shariah* Advisory Council. It will affect the basis of judgment by *Shariah* Advisory Council for example, if there is *Syiah* followers been appointed as the member of *Shariah* Advisory Council, then the opinion from *Syiah* scholars may be put into the consideration in judgment by *Syariah* Advisory Council.

5.2 Future Direction of the Research

As this research is limited to focus only on four contracts in *Shariah* Resolution of *Shariah* Advisory Council (SAC) of Bank Negara Malaysia (BNM), another researcher may continue the research on the another contracts available in the *Shariah* Resolution. In other hand, the other researcher may use another method such as interview to collect different data and get more information about the practices of *mazhab* in Islamic Finance and Banking in Malaysia.



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